No. 95-789

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS, COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC., MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

REPLY BRIEF

JOHN M. REA, Chief Counsel,
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel,
FRED D. LONSDALE, Sr. Counsel,
JAMES D. FISHER, Counsel,
SARAH COHEN, Counsel,

State of California
Department of Industrial Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 972-8900

Counsel for State Petitioners
Department of Industrial Relations
Division of Apprenticeship Standards

H. THOMAS CADELL, JR.,
Chief Counsel,
RAMON YUEN-GARCIA,
Counsel,

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603,
San Francisco, CA 94142)
(415) 975-2060

Counsel for State Petitioners
Division of Labor Standards
Enforcement and County of Sonoma

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page/s

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

CALIFORNIA STATUTES

CALIFORNIA REGULATIONS

OTHER AUTHORITIES

I. Introduction

Dillingham and its Amici discuss issues surrounding potential state regulation of apprenticeship as if review had not been granted on a specific question. The issue in this case is a narrow one. The sole question is whether ERISA preempts California's restriction of its lower apprentice wage on state-funded public works to workers who are registered in apprenticeship programs that have been approved as meeting federal standards.

Dillingham does not address the practical results of preemption, such as the creation of an inconsistency between state and Davis-Bacon definitions of "apprentice." Nor does Dillingham address the historical background of apprenticeship which Congress would have considered when it passed ERISA. These are factors which New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers, 115 S. Ct. 1671 (1995) commends in determining congressional intent. These factors are just as important for understanding the purpose of the savings clause as for determining the threshold issue of whether California's law relates to ERISA plans. Dillingham, instead, remains focused almost entirely on the unhelpful text of ERISA. As is shown below, this narrow focus cannot bring into balance the various state and federal interests which intersect in the issue before the Court.

II. The Fitzgerald Act Would Be Severely Impaired By Preemption Of California's Law.

The question before the Court can be decided solely on the basis of the ERISA savings clause. Even if California's law did relate to an ERISA plan within the meaning of Travelers, it will not be preempted where doing so would impair or modify another federal law, the Fitzgerald Act. Because of the effects of

Dillingham on the states' collective abilities to further federal interests in apprenticeship, ERISA's savings clause is a straightforward basis for preserving this application of California's prevailing wage law.

Dillingham's reading of the savings clause is very narrow and only repeats, without analysis, the Ninth Circuit language about Shaw v. Delta Airlines, 463 U.S. 85 (1983). Dillingham does not respond to any of the argument about the practical effects of preemption on, for example, the availability or quality of apprentices for future federal public works, the use of apprenticeship for social or other goals in other federal non-construction programs, or the federal-state partnership set out in the Fitzgerald Act and the Secretary's regulations. Dillingham apparently concedes that there would be a massive workload shift from the state to the federal Bureau of Apprenticeship and Training ("BAT"). Dillingham nowhere disputes that program quality would suffer as a result of pressure from the existence of plans which would not need to include an educational component or supervised on-the-job training, but would only need to be ERISA-covered.

Dillingham's dismissal of the savings clause ignores the language of ERISA which saves laws where preemption would impair or modify other federal laws or regulations. While it is true that the Fitzgerald Act does not have an enforcement mechanism and does not prohibit anything, neither of these facts means that the Act will not be impaired by the preemption of state law, where the state law is integral to the congressional scheme and purpose set out in the Fitzgerald Act itself.

Dillingham's argument rests on the assumption that "the Fitzgerald Act is nothing more than a statement of policy and good intentions." Brief of Dillingham at 42. This formulation ignores both the text of the Act and almost 40 years of the history of apprenticeship under that Act. The Fitzgerald Act specifically directs the Secretary of Labor to "formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices." The Act directs the Secretary to "extend" application of such standards, to "encourage" their inclusion in contracts of apprenticeship and to "cooperate" with states in formulating and promoting standards of apprenticeship. 29 U.S.C. § 50 (1994). Dillingham will discourage the inclusion of standards in apprenticeship agreements, will result in a contraction of the application of such standards and will, in all likelihood, severely diminish any state cooperation with the federal effort to promote apprenticeship. If this does not "alter" or "invalidate" the Fitzgerald Act, it surely "modifies" or "impairs" it.

The Secretary's regulations are also impaired if California's law remains preempted. Dillingham makes the fanciful assertion that the Secretary of Labor's regulations contemplate approval for federal purposes only, and that approval is not authorized for state purposes.[1] Brief of Dillingham at 43. Again, the text of the regulations and the history of apprenticeship practice before and after passage of the Fitzgerald Act make clear that this is a completely unfounded reading of these regulations. The regulations have two stated purposes. One is to "set forth labor

[1] This is especially illogical where, as in this case, the state purpose is exactly the same as the federal purpose--to determine which apprentices may be paid the lower apprentice wage on government-funded construction.

standards to safeguard the welfare of apprentices." Another is to extend those standards by formally giving states the ability to approve apprenticeship programs for federal work as well, if the state adopts acceptable apprenticeship procedures and laws. 29 C.F.R. § 29.1 (1995), Pet. App. 64.

Dillingham's reading of these regulations as only concerning federal purposes turns the historical development of apprenticeship on its head. Historically, approval of apprenticeship programs began with state approval for state purposes. The Fitzgerald Act then incorporated what the states had begun. The 1977 regulations extended and formalized a working relationship that had existed under the Fitzgerald Act since 1937. With the 1977 regulations, in states with acceptable laws and standards meeting federal regulations, the federal BAT agreed to continue its administrative practice of accepting state approval as valid for federal purposes as well. That the regulations assume the states' authority appears in 29 C.F.R. § 29.12(c) (1995), Pet. App. 87, which allows "currently recognized" agencies to formalize "continued recognition." This makes sense only if state agencies were already in existence and approving programs for state purposes.[2] If, as Dillingham suggests, the states were to be shut off from any state use of the approval process, why would any state agree to accept the Secretary of Labor's invitation to devote resources to a purely federal responsibility? Under Dillingham's logic, the California Apprenticeship Council, once approved by the Secretary under those regulations, would have been able to offer only federal approvals after four decades of

[2] California's Apprenticeship Council was created in 1939, 1939 Cal. Stat. 220 (current version at CAL. LAB. CODE § 3070 (West 1989)), and approved under the 1977 regulations. J.A. 37, Decl. Jesswein, ¶ 3.

doing both state and federal. This is a very unlikely and ahistorical reading of these regulations.

The terms of ERISA's savings clause indicate an intent to save from preemption federal laws which relate to employee benefit plans. This comports with Congress' goal of federalizing regulation of employee benefit plans, thus eliminating conflicting state and local regulation while at the same time protecting the interests of workers in actually receiving the benefits promised to them. Dillingham's argument that only laws which rely on directives and commands are saved is not required by the text and is quite inconsistent with the purpose of the savings clause. In the area of pension benefits Congress provided substantive regulation. In the area of employee welfare benefits Congress did not, and so the savings clause was an important tool to protect those federal laws concerning welfare plans which did exist. Congress did not intend to lessen the protections for workers when it passed ERISA. It is hard to imagine a law more appropriately saved than the Fitzgerald Act. At the time of passage, the federal government and the states had worked together for almost 40 years to expand the standards of apprenticeship and to protect the welfare of the apprentice. This is the very sort of law Congress must have had in mind in enacting a savings clause.

III. "Apprenticeship Program" Is Not A Synonym For ERISA Plan.

Dillingham responds to California's argument that Congress never intended to preempt California's ability to restrict its apprentice wage to registered apprentices by asserting that this Court need not consider questions of congressional intent or the purpose of ERISA because, Dillingham claims, the California law

"refers" to employee benefit plans in its text. The text says only that it is "apprentices ... in training under apprenticeship standards and written apprentice agreements ... " who may be paid a lower apprentice wage. CAL. LAB. CODE § 1777.5 (West Supp. 1996), Pet. App. 58. Thus, Dillingham must show that all apprenticeship programs are covered by ERISA. While many programs which have been involved in prior litigation in fact may have been covered by ERISA, it is simply not the case that apprenticeship program and ERISA plan are synonymous.

Dillingham supports its assertion that all apprenticeship programs are ERISA plans by pointing to a number of cases, including this one, where the programs were multi-employer funded plans to provide apprenticeship. See, e.g., National Elevator Industry, Inc. v. Calhoon, 957 F.2d 1555 (10th Cir. 1992), cert. denied, 506 U.S. 953 (1992)(receives regular contributions); Hydrostorage v. Northern Cal. Boilermakers, 891 F.2d 719 (9th Cir. 1989), cert. denied, 498 U.S. 822 (1990). California does not dispute that some programs are ERISA-covered. In Hydrostorage, however, the court said only that the apprenticeship standards and trust fund were both covered. Id. at 728 (standards are an integral part of a larger "program"). Other cases cited by Dillingham are even less helpful. Keystone Chapter, ABC v. Foley, 37 F.3d 945 (3d Cir. 1994), cert. denied, 115 S. Ct. 1393 (1995), for example, does not discuss the issue of coverage, but only cites to ERISA's definition of an employee welfare benefit plan. Id. at 954. No case has held that all arrangements to provide apprenticeship are covered under ERISA.

The most knowledgeable authority to have considered the specific question of whether every plan is covered by ERISA, the

United States Department of Labor ("DOL"), has concluded that not all training and apprenticeship plans are covered by ERISA.[3] The Secretary's opinion is entitled to great weight, as are the regulations issued by the Secretary concerning the scope of ERISA coverage. Massachusetts v. Morash, 490 U.S. 107, 116 (1989). Extending ERISA to claims for various unfunded benefits would greatly expand the jurisdiction of the federal courts into areas of traditional state regulation, an extension unsupported by Congress' primary concerns in enacting ERISA. Id. at 118-119. Dillingham's rejection of the Secretary's position would mean that every time an employer plans a training on how to use a new power tool or computer system, an ERISA training or apprenticeship plan has been created. Is federal court the proper venue for employees who feel they have not been trained on how to use Windows 95 properly?[4] Any private employer who hired an unskilled worker and who planned to train that worker would find, under Dillingham's argument, that the employment relationship for the period of training was covered by ERISA and had been federalized.

One problem with Dillingham's textual argument is that it does not account for part of ERISA's text. ERISA contemplates that there will be both a "plan, fund, or program" and a benefit provided by that plan, fund, or program. Thus, coverage occurs when there is both an apprenticeship program and a "plan, fund, or program" to provide that apprenticeship to employees or union members. As this Court noted in Fort Halifax Packing Co., Inc. v.

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[3] The Department of Labor opinion letters cited by Dillingham are not to the contrary. Both involved trusteed plans. Also, there are other opinion letters besides the two cited by Dillingham which do make the distinction between funded and unfunded plans. See, e.g., ERISA Advisory Opinion No. 94-14A (April 29, 1994).

Coyne, 482 U.S. 1 (1987), and as Dillingham concedes in its Brief at 12, a benefit is not the same as a plan to provide the benefit. This remains true even where the benefit is a program. The Court does not need to reach the questions raised by Amicus Curiae AFL-CIO to see that an apprenticeship program, as a matter of ERISA's text, is not the same as a plan to provide it. A text-based argument which does not account for all of the text does not compel a court to turn its eyes from the statutory purpose, and decades of federal practice, when the court determines the meaning of a statute.

Dillingham asserts that its broad reading of the term "apprenticeship program" is supported by the definition in the Fitzgerald Act regulations. These regulations define "apprenticeship program" broadly, but they also define "apprentice" as someone in an approved program. If we assume that ERISA intended to rely on Fitzgerald Act definitions, the result would be that the only ERISA-covered apprenticeship programs would be those that are approved by BAT or a BAT-approved state apprenticeship council because the only apprentices are those in approved programs. An argument can also be constructed from the text of the Fitzgerald Act regulations that if the regulations define apprentice for *all* "federal purposes," those purposes would include ERISA, another federal statute.[5] A purely textual reading of the regulation is, however, not appropriate given the history and purpose of the regulations.[6]

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[4] See Brief of Amicus Curiae ABC Golden Gate at 18, n. 20 (suggesting that apprentice disputes could all be heard in federal court under 29 U.S.C. § 1132 (1994)).

[5] The regulation includes as federal purposes any "benefit" or "right" pertaining to apprenticeship. 29 C.F.R. § 29.2(k) (1995), Pet. App. 66.

[6] The examples of "federal purposes" given in the comments to rulemaking were the Davis-Bacon Act and the Service Contract Act. 42 Fed. Reg.

Even if, for the sake of argument, one assumes that California's use of "apprentice" or "apprenticeship program" was per se a mention of an employee benefit plan, this mention is not the sort of "reference" to an employee benefit plan that triggers preemption under District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992). In that case, the District required employers to provide health benefits for eligible employees which were measured by reference to the employer's "existing health insurance coverage."[7] This Court found that setting benefits by reference to an ERISA plan was preempted. Nothing like that is involved here. Wages are set by reference to the Director's prevailing wage determinations. See CAL. CODE REGS. tit. 8, § 230.1 (1995).[8] The Director reviews and statistically tests multiple sources of wage data. CAL. LAB. CODE §§ 1773-1773.8 (West 1989 and Supp. 1996). The determinations set out what wage is prevailing for each classification of worker in the location of the public work independent of--and ignorant of--the ERISA status of any apprenticeship plan. This is not the type of "reference" contemplated by Greater Washington.

California's law did not intend to refer to ERISA plans nor is it premised on the existence of ERISA plans. Contrast Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990). California

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10,138-10,139 (1977), Pet. App. 99. There is no evidence of whether the Department of Labor takes the position that the Fitzgerald Act regulations were intended to define apprentice for purposes such as ERISA.

[7] The District conceded that the statutory benefits were "set by reference to covered employee welfare benefit plans." Greater Washington, 506 U.S. at 128.

[8] Amicus Curiae ABC Golden Gate is incorrect in stating, in its brief at 9, n.14, that California requires all programs to follow union rates. All programs, joint and unilateral, are required to follow the Director's prevailing wage. Among other factual errors, ABC Golden Gate is also wrong to assert that federal rules allow a program to set its own wages on public works. See 29 C.F.R. §5.5(a)(4) (1995)(apprentices are paid the rate

had restricted its apprentice wage to "registered apprentices" for almost 40 years prior to the passage of ERISA. Although it has been said that many national trends begin in California, it would be impossible for the state to have intended to refer to ERISA plans almost 40 years before Congress created the concept of an ERISA plan.

Dillingham also asserts that California's wage law is "presumptively preempted" because the law mandates benefits to be provided by an ERISA plan. In an effort to show that California's law mandates benefits, Dillingham first relies on provisions from the text of California Labor Code section 1777.5 which have been modified by court decisions and regulation, and thus are no longer enforced as written. Brief of Dillingham at 26-27. For example, Dillingham suggests that the employment of apprentices on public works must be in accordance with the apprenticeship standards. California has modified its regulations to eliminate this requirement. As to the enforcement of other terms in section 1777.5, see California's Opening Brief at 12, n.5.

Dillingham then asserts that the wage law necessarily mandates a benefit because wages are a part of an apprenticeship program. This argument moves well beyond the reasoning of the Ninth Circuit,[9] which held only that California could not deny its lower apprentice wage to a worker in a program based on whether that program was approved. Dillingham now asserts that the wage itself is a term of the ERISA plan, and so the state may not

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expressed as a percentage of the journey rate in the wage determination, not in the standards).

[9]It also goes beyond the reasoning of the Tenth Circuit. See National Elevator Industry, Inc. v. Calhoon, 957 F.2d 1555 (10th Cir. 1992), cert. denied, 506 U.S. 953 (1992). There the state restricted the apprentice/trainee wage to workers in approved programs. There was no suggestion that the employer could choose whatever rate the employer wished

enforce any prevailing wage for apprentices. Instead, the state must defer to the program and any wage set by the program.

Dillingham's new position has a number of flaws: Wages are not an employee benefit under ERISA or any other labor law. Wages are paid by an employer, not by an apprenticeship program. A similar attempt to preempt a state wage and hour law by calling wages an employee benefit failed before this Court in Morash. Because ERISA lacks any substantive requirements for apprenticeship plans, ERISA does not require that an apprenticeship plan cover wages. Approval under the Fitzgerald Act does require a program to include a progressive schedule of wages, 29 C.F.R. § 29.5(b)(5) (1995), Pet. App. 73, but in doing so defers to the state to set those wages:

> The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement.

Id. (emphasis added).

The practical effect of Dillingham's new position would be that an employer with an ERISA-covered "training plan" could unilaterally incorporate wages and hours into a training plan and then fix wages below state minimums and mandate hours in excess of state maximums, and thereby circumvent state minimum labor standards.[10] Dillingham's only justification for tossing aside

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for trainees in the ERISA program, only that the state could not limit the apprentice/trainee wage to workers in approved programs.

[10] If Dillingham's position concerning wages is accepted, nothing would prevent some employer from arguing that ERISA would preempt state regulation of other terms usually found in an apprenticeship program. Because approved apprenticeship programs include "safety training," 29 C.F.R. § 29.5(b)(9)(1995), Pet. App. 73, a program could create its own rules about exposure to toxic chemicals or radiation, or working in high places without protection. Dillingham's position has no stopping point. All state regulation of "working conditions," would, under Dillingham’s position, be preempted

this most traditional area of state regulation is the assertion that wages are "essential terms and conditions of an apprenticeship program." Brief of Dillingham at 29.

While a program must include a progressive schedule of wages conforming with 29 C.F.R. § 29.5(b)(5)(1995), in order to meet federal standards, nothing implies that those wages can fall below state minimums. Read in the context of the preceding regulation concerning ongoing instruction, § 29.5(b)(4), and subsequent regulations concerning periodic review and evaluation, § 29.5(b)(6), and credit for prior experience, § 29.5(b)(12), it is clear that the purpose of the regulation is to ensure that wages increase as skill is acquired, not to allow the opportunity for creating sub-minimum wages. For examples of the broad range of programs that can arguably be ERISA training plans, and under Dillingham's doctrine would be a plan whose terms would trump state minimum wage laws, see the Brief of Amicus Curiae ABC Golden Gate at 3, (training in math improvement and English as a second language as ERISA-covered training or apprenticeship).

Allowing a program to set wages for apprentices is inconsistent with the constitutional and administrative rejection of the uncertainty entailed in a post hoc examination of whether the contractor had paid the correct prevailing wage rate. As discussed in California's Opening Brief at 10-11, the bid process for construction projects subject to prevailing wage requirements depends on a prior determination of the wage rate for each classification of worker. A prior determination puts all bidders on an equal labor cost footing, and eliminates the possibility that a contractor will learn only after building a project that the wages paid were too low. Amicus Curiae ABC Golden Gate

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where an employer has made each condition a term of an ERISA apprenticeship or

recognizes the need for some definition of apprentice beyond one made up at the job site by a contractor when starting a public works job. Brief of Amicus Curiae ABC Golden Gate at 18, n.20. Their proposed definition would presumably be applied when a question arises during the course of a job as to who is an apprentice. However, wage rates and labor costs cannot be determined in advance if some after-the-fact judicial process is needed to assess whether the contractor was entitled to pay the apprentice wage based on whether the contractor's plan was really an apprenticeship plan and really covered by ERISA. In contrast to ABC Golden Gate's proposal, the states' common use of the Davis-Bacon definition of apprentice--one already registered in an approved program--allows contractors to bid with certainty about which workers can be paid an apprentice wage, and avoids the need for government imposition of penalties and back wages on its public works jobs.

In addition to the many practical problems outlined above, existing ERISA preemption doctrine is incompatible with Dillingham's position. If a state were to modify its prevailing wage law to conform to Dillingham by saying that all workers on jobs funded with state money shall be paid the journey-level prevailing wage *except* those workers (apprentices or trainees) who are covered in ERISA plans, such a state law would single out ERISA plans in the precise way found preempted in Mackey v. Lanier Collection Agency and Services, Inc., 486 U.S. 825 (1988). Likewise, if Dillingham's argument that a state prevailing wage law is automatically preempted if it mentions the term "apprentice" is followed to its conclusion the result is equally

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trainee program.

absurd: there could be no apprentice wage. None of the parties have urged such a draconian resolution of this difficult issue.[11]

IV. The Intent Of The Congress That Passed ERISA Controls.

Dillingham offers little in the way of legislative history or historical background in support of its reading of the text of ERISA. Instead, Dillingham suggests that the failure of Congress in 1994 to amend ERISA supports its position. The notion that Congress' failure in 1994 to act on a bill, which raised issues well beyond the narrow issue in this case, is evidence of congressional intent in passing ERISA in 1974 is misplaced and indicative of the lack of support in the relevant legislative history for Dillingham's position. This Court has made the point that the intent of a later Congress does not control the meaning of a law enacted by an earlier Congress. This principle was set out in Mackey:

> [T]he opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue. United Airlines Inc. v. McMann, supra, at 200, n. 7, 98 S.Ct., at 448, n. 7.
> "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960).
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> .... "It is the intent of the Congress that enacted [the section] ... that controls." Teamsters v. United States, 431 U.S. 324, 354, n. 39, 97 S.Ct. 1843, 1864, n. 39, 52 L.Ed.2d 396 (1977).

Mackey, 486 U.S. at 841. Citing this later inaction by Congress tacitly admits that there is no legislative history dating from ERISA's original enactment to support the position of Dillingham and its Amici.

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[11] Such a rule would have disastrous consequences for apprenticeship and might lead some to argue that under Travelers the acute indirect economic

Even if the actions of a later Congress were instructive as to legislative intent, the meaning of the actions of this Congress are less than clear. The House passed H.R. 1036 by a vote of 276 ayes to 150 noes. 139 CONG. REC. H8977-78 (1993). The similar Senate bill, S. 1580, was introduced in the Senate a few days before the House vote by Senators Specter and D'Amato,[12] and Senator Specter described support as bipartisan. 139 CONG. REC. S14,194 (1993). The bill in question went beyond the narrow issue raised in this case, and included language on mechanics liens and the general regulation of apprenticeship. It is speculation to say why it did not move further in the Senate after passing the House.

V. Limitation Of The Apprentice Wage To Registered Apprentices Does Not Impose State Standards On Plans Independent Of Federal Standards Under the Fitzgerald Act.

Dillingham's, and especially its Amici's, reliance on the failure of the Senate to join the House in passing H.R. 1036, reflects concern about how the proposed law would affect the rules for program approval. Concerns about state obstruction in the approval process were expressed at that time. Brief of Amicus Curiae ABC Golden Gate at 6, 13, 27. This argument is directed, not to the issue in this case, but to what are described as previous abuses of the approval process[13] and to claims that state regulation of program approval will unfairly disadvantage certain programs. Brief of Amicus Curiae ABC Golden Gate at 4, n.8, 12-13; Brief of Amicus Curiae Coalition to Preserve ERISA Preemption

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effect of such a rule should lead to preemption. This analysis leaves the state with no non-preempted alternatives, another absurd situation.

[12] It was the House bill, not S. 1580, which was offered in the Senate by Senator Kennedy. 140 CONG. REC. S8381 (1994).

[13] Amicus Curiae Coalition to Preserve ERISA Preemption is incorrect in asserting, in its Brief at 16, that Dillingham was penalized because Arceo's apprentices were in a plan which had been denied approval. The plan was slow

at 14-15; Brief of Amicus Curiae Associated General Contractors at 14-18. These concerns have already been addressed in cases such as Electrical Joint Apprenticeship Comm. v. MacDonald, 949 F.2d 270 (9th Cir. 1991), cert. denied, 505 U.S. 1204 (1992) and Southern California ABC v. California Apprenticeship Council, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992) ("SoCal ABC"). It is true that, if the approval process includes criteria which are not drawn from the Fitzgerald Act regulations (for example, a requirement that a program be funded by a trust fund, or that a program be union-sponsored) then the limitation of the apprentice wage to those in approved programs would also be a way of enforcing that independent state regulation. If, on the other hand, the approval process only considers criteria drawn from the Fitzgerald Act, then using a definition of registered apprentice to limit the apprentice wage does not introduce any additional state regulation.

One point of MacDonald and SoCal ABC was to level the playing field and to remove obstacles to those contractors who wanted to provide apprenticeship training meeting the federal standards. Dillingham goes well beyond that goal, and opens the door to programs with no standards and no real training. The result is to undercut the effects of MacDonald and SoCal ABC, because those bona fide programs which had suffered difficulty or delayed approval would find that they had finally gained approval only to have the benefits of the approval vanish.[14]

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to complete its application but when it did it was approved. California's Opening Brief at 14-15.

[14] This would also be true for new programs which are willing to meet the federal criteria.

Dillingham's Amici seem to assume that approval is unimportant and that sham programs would fade away while high quality apprenticeship programs would prevail in the marketplace, because the market will reward the best programs. This is plausible so long as the competition is only among programs which provide bona fide apprenticeship training. However, when a sham program is in the business of providing low wage workers just for the length of a public works job, and is not in the business of providing training, the nature of "the market" for the contractor is very different. Contractors who are seeking the lowest wage and lowest cost for one job will not be concerned about the quality of training. Dillingham thus distorts the labor market for apprenticeship programs just as bad currency drives good out of circulation. Apprenticeship programs which are designed to provide low wage workers, and not to train, do not compete in the labor market with bona fide apprenticeship, but instead end the possibility of fair competition among programs in a fair labor market and jeopardize real training.

VI. Conclusion

For the reasons stated above and in California's Opening Brief, the judgment of the Ninth Circuit should be reversed.

Dated: September 3, 1996, San Francisco, California

Respectfully submitted,

JOHN M. REA, Chief Counsel
(Counsel of Record)
VANESSA L. HOLTON,
Asst. Chief Counsel
FRED D. LONSDALE, Sr. Counsel
JAMES D. FISHER, Counsel
SARAH COHEN, Counsel

State of California
Department of Industrial
Relations

H. THOMAS CADELL, JR.,
Chief Counsel
RAMON YUEN-GARCIA,
Counsel

State of California
Division of Labor
Standards Enforcement
45 Fremont Street

Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 972-8900

Counsel for State Petitioners
Department of Industrial Relations
Division of Apprenticeship Standards

Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 975-2060

Counsel for State Petitioners
Division of Labor Standards
Enforcement and
County of Sonoma